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No. 93-1210

In the

Supreme Court of the United States

October Term, 1993

CHARLES LePRINCE,

Petitioner,

v.

BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the partial forfeiture of the monthly pension allowance of a former school psychologist after his conviction for aggravated sexual contact with one of the students under his care constitutes a second punishment within the meaning of the Double Jeopardy Clause.

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF FACTS

For almost 23 years, the Clifton, New Jersey public school system employed petitioner as a school psychologist responsible for counseling students facing emotional and psychological problems. He retired on January 1, 1986, on a veteran's retirement and thereafter, collected a pension in the amount of $1,465.08 every month.

Two years after his retirement, on February 23, 1988, petitioner was indicted on seven counts charging him with aggravated criminal sexual contact, criminal sexual contact, official misconduct and sexual assault. These charges arose out of incidents involving students placed with him for counseling while he was still working as a school psychologist. Petitioner pled guilty to Count One of the

indictment on December 20, 1989 and consequently, was sentenced to three years probation plus continued therapy to address his diagnosed paraphiliac attraction to young adolescent males. The sentencing court also entered an order prohibiting petitioner from becoming involved with young people in any capacity. The charge to which petitioner pled guilty reads as follows:

> The Grand Jurors of the State of New Jersey for the County of Passaic under their oaths present that Charles Edward LePrince on or about a date which fell between January 1 and June 30, 1982 in the City of Clifton in the County of Passaic and within the jurisdiction of this Court, did commit an act of sexual contact with [B.C.], and when [B.C.] was at least 13 but less than 16 years old and Charles LePrince had supervisory power over [B.C.] by virtue of professional or occupational status, for the purpose of sexually arousing or sexually gratifying the said Charles Edward LePrince, contrary to the provisions of *N.J.S.* 2C:14-3a and under circumstances set forth in *N.J.S.* 2C:14-2a(2)(b) and against the peace of this State, the government and dignity of same.

The Board of Trustees, Teachers' Pension and Annuity Fund (the "Board") reviewed the facts surrounding petitioner's conviction to determine his continued pension eligibility. In accordance with New Jersey's relevant pension statute *N.J.S.A.* 18A:66-1, *et seq.*, and the balancing test established by the New Jersey Supreme Court in *Uricoli v. Police & Fire. Retirem. Sys.*, 91 *N.J.* 62, 449 *A.*2d. 1267 (1982), the Board found that because of his conviction, petitioner's service as of January 1, 1982 was not creditable service and therefore, he could no longer receive pension benefits for any period thereafter. As a

result, he was entitled to receive benefits for only 18 years and nine months of service instead of 22 years and nine months of service. This reduced his monthly pension allowance from $1,465.08 to $655.02 as of September 1, 1990.

Additionally, because petitioner had been receiving $1,465.08 in monthly pension benefits for over four years and because petitioner's term of creditable service was subsequently reduced, the Board found that he had received more than he should have for that four year-period and ordered the recoupment of the overpaid amount. Consequently, his monthly pension allowance was reduced further to $385.00, until the $46,287.96 overpayment was fully recouped.

The Board's decision to forfeit part of petitioner's pension was upheld after a hearing before the New Jersey Office of Administrative Law. The Appellate Division of the Superior Court of New Jersey also upheld the Board's decision, finding that the partial pension forfeiture was appropriate in this case. *LePrince v. Teachers' Pension Fund*, 267 *N.J. Super.* 270, 631 *A.*2d 545 (App.Div.1993). Additionally, the Appellate Division concluded that the Double Jeopardy Clause had not been violated because the partial forfeiture constituted a "proportionate remedy for appellant's dishonorable service." *Id.* at 275. However, the court remanded the matter for reconsideration of the issue of recoupment of the overpayment "only because the record does not indicate that the issue received adequate consideration under the *Uricoli* test in light of some evidence that the reduction of LePrince's monthly allowance to $385 is causing severe financial hardship." *LePrince*, 267 *N.J. Super.* at 277-78.

Thereafter, petitioner filed a Petition for Certification which was denied by the New Jersey Supreme Court. His subsequent his Motion for Reconsideration was also denied.

SUMMARY OF ARGUMENT

The partial forfeiture of petitioner's pension after his conviction for aggravated criminal sexual contact with a student placed in his care as a school psychologist constituted a reasonable sanction for his failure to fulfill the obligation to provide honorable public service. The pension board properly weighed all of the equitable factors in determining that petitioner should forfeit only a portion of his pension. The partial forfeiture did not violate his guarantee against double jeopardy since the sanction was a proportionate remedy for his dishonorable service and was not intended to punish him, but was imposed to ensure that public pension funds were not granted for dishonorable service.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE FORFEITURE OF A PORTION OF THE PENSION OF A FORMER SCHOOL PSYCHOLOGIST AFTER HIS CONVICTION FOR SEXUALLY ABUSING A STUDENT IS NOT PUNISHMENT WITHIN THE MEANING OF THE DOUBLE JEOPARDY CLAUSE.

In New Jersey, public employees seeking pension benefits must satisfy the implied condition of honorable public service. *See Corvelli v. Board of Trustees*, 130 *N.J.* 539, 550, 617 *A.*2d 1189, 1195 (1992); *Uricoli v. Police & Fire. Retirem. Sys.*, 91 *N.J.* 62, 66, 449 *A.*2d. 1269 (1982); *Masse v. Public Employment Retirem. Sys.*, 87 *N.J.* 252, 256, 432 *A.*2d 1339, 1341 (1981); *Makwinski v. State*, 76 *N.J.* 87, 90, 385 *A.*2d 1227, 1229 (1978). In certain circumstances where the employee has committed some misconduct during the term of employment, it has been determined that pension forfeiture is an appropriate sanction for dishonorable public service. *See Corvelli*, 130 *N.J.* 539, 617 *A.*2d 1189; *Uricoli*, 91 *N.J.* 62, 449 *A.*2d. 1269. Whether an employee's misconduct will lead to pension forfeiture depends on the facts of each case. "[T]he proper approach to the resolution of the problem of what constitutes dishonorable service justifying the forfeiture of earned pension benefits is one which calls for flexibility and the application of equitable considerations." *Uricoli*, 91 *N.J.* at 77, 449 *A.*2d at 1275. This equitable approach reflects the New Jersey Supreme Court's rejection of automatic total pension forfeiture, even in cases where the employee's misconduct is related to the employment. *Id.*

Thus, in New Jersey, a person's pension may not be forfeited, in part or in whole, without first applying an eleven-factor balancing test to the circumstances of his or her case. The forfeiture analysis must include the consideration of

> (1) the employee's length of service;
>
> (2) the basis for retirement, *i.e.*, age, service, disability, etc.;
>
> (3) the extent to which the employee's pension has vested;
>
> (4) the duties of the particular employment;
>
> (5) the employee's public employment history and record;
>
> (6) the employee's other public employment and service;
>
> (7) the nature of the misconduct or crime, including the gravity or substantiality of the offense, whether it was a single or multiple offense and whether it was continuing or isolated;
>
> (8) the relationship between the misconduct and the employee's public duties;
>
> (9) the quality of moral turpitude or the degree of guilt and culpability, including the employee's motives and reasons, personal gain, and the like;

> (10) the availability and adequacy of other penal sanctions; and
>
> (11) other personal circumstances relating to the employee bearing upon the justness of forfeiture.

Uricoli, 91 *N.J.* at 78, 449 *A.*2d. 1275-6. New Jersey's Supreme Court, thus, has established a test that "accommodates equitable considerations." *Corvelli*, 130 *N.J.* at 552, 617 *A.*2d at 1195.

The circumstances of this case led the pension board, the Administrative Law Judge and the Appellate Division to conclude that partial forfeiture of petitioner's pension was an appropriate sanction. Petitioner served as a school psychologist responsible for evaluating and counseling troubled public school students. He was convicted of sexually abusing one of the students over whom he exerted his supervisory power. Although the conviction occurred after his retirement, petitioner committed the offense in 1982, while he was still working for the Clifton public school system. Given these facts, the pension board weighed all of the factors under the balancing test and determined that the circumstances warranted a forfeiture of only that part of his pension benefits accruing after the date of his criminal misconduct.

Petitioner insists, however, that the partial forfeiture of his pension violated the Double Jeopardy Clause. In *U.S. v. Halper*, 490 *U.S.* 435 (1989), this Court addressed the question of "whether and under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause." 490 *U.S.* at 446. In discussing this issue, the Court cautioned that the question could not be answered from the defendant's point of view because "even remedial sanctions carry the sting of punishment" for the

defendant. 490 *U.S.* at 447, n.7. Instead, an analysis must be made as to the character of the sanction and the purposes that it may serve. Thus, "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 448-449. In a recent case involving the Eighth Amendment's Excessive Fines Clause, *Austin v. U.S.*, __ *U.S.* __, 113 *S.Ct.* 2801 (1993), this Court stated that the determination as to whether *in rem* civil forfeiture statutes constituted punishment depended on whether the forfeiture sanction "can only be explained as serving in part to punish." *Id.* at 2806. Relying primarily on *Halper* and *Austin*, petitioner in this case argues that the forfeiture of part of his pension constitutes a punishment in violation of the Double Jeopardy Clause.

The goal of pension forfeiture is not to punish in the "relevant sense" under the Double Jeopardy Clause. *See Halper*, 490 *U.S.* at 448. The forfeiture of pension benefits serves the purpose of ensuring that public pension monies are granted only to public employees who have provided honorable service. Where an employee has failed to provide honorable, creditable State service, the employee is not entitled to reap the benefits of the public pension fund. The New Jersey Supreme Court has reaffirmed that "[a]ll public pension statutes in this State carry the implicit condition precedent of honorable service to an award of pension benefits, and forfeiture can be ordered for failure of that condition." *Corvelli*, 130 *N.J.* at 550, 617 *A.*2d at 1195. Although the sanction has been labeled punishment, *see Corvelli*, 130 *N.J.* at 552, 617 *A.*2d at 1195, pension forfeiture "is not punishment in the criminal sense, but rather is a collateral consequence of the employee's breach of the condition of honorable service." "The 'punishment' is analogous to a judgment for damages arising out of a breach of contract." *LePrince v. Teachers' Pension Fund*,

267 *N.J. Super.* 270, 277, 631 *A.*2d 545, 549 (App.Div. 1993).

The balancing test that must be performed in order to forfeit a person's pension in New Jersey reflects this Court's intention in *Halper* to prevent the imposition on criminal defendant's of disproportionate civil sanctions that rise to the level of prohibitive double punishment. In making the *Halper* analysis, the facts of each particular case must be carefully considered. This Court noted that "a civil as well as a criminal sanction constitutes punishment when the sanction as applied to the individual case serves the goals of punishment." *Halper*, 490 *U.S.* at 448 (emphasis added).

In petitioner's case, the forfeiture of only part of his pension was not to punish him for the conviction, but to ensure that public pension funds were not used to compensate an employee who had breached the requirement that he provide honorable service. Indeed, the pension board determined that petitioner would forfeit only those pension benefits representing service after the commission of his offense, that is after 1982, the date he committed the criminal action. The State would be remiss in its duty to properly administer the public pension system if it were required to pay petitioner for public service tainted by his sexual abuse of one of the students he was assigned to counsel.

As stated by the Appellate Division below, "[t]he proceeding before the [pension] Board was intended to and did fashion a proportionate remedy for appellant's dishonorable service." *LePrince*, 267 *N.J. Super.* at 275, 631 *A.*2d at 548. This Court acknowledged in *Halper* that the determination that a civil sanction violates the guarantee against double jeopardy will be made only in the rare case, where the sanction is "overwhelmingly disproportionate" to the damage caused by the offender. *Halper*, 490 *U.S.* at

449. The forfeiture of only a part of petitioner's pension cannot be deemed an overwhelmingly disproportionate sanction for the breach of his obligation to provide honorable public service. In this case, there has been no violation of the Double Jeopardy Clause.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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